Assuming, however, that the recital in question would be sufficient to estop plaintiff in an action upon the Agreements, it must be remembered that this is an action upon the Concession and there can be no estoppel arising out of a deed where the action is not founded on the deed, but is wholly collateral to it. The authority for this proposition is *Re Ghost's Trusts* (1883) 49 L.T. 588. That was a case in which pecuniary legatees who had not received legacies in full executed a release to the trustees acknowledging receipt of legacies, it was held that they were not estopped from claiming the balance on the subsequent falling in of other funds.

That was a stronger case than this because the release apparently concluded the matter once for all, whereas here the recital by recording a doubt manifestly leaves it open.

It is evident that the agreements were intended to be nothing more than purely temporary arrangements, and the recitals in them seem to me to have been expressed with deliberate vagueness in order that neither party should appear to have abandoned his own construction of the Concession.

Upon these grounds I hold that the plea of estoppel fail.

To summarise my conclusions, I find that plaintiff is entitled to the declaration for which he asks, and to such damages as he may prove to have sustained by the action of the Government in preventing non-residents of Kampong Ah Fook gaming there during the current year. He is not entitled to the return of monies paid by him to Government under the Agreements of the 27th January 1909 and the 15th February 1910, nor to any damages in respect of any period prior to the making of these Agreements, for the reason that the Agreements were a voluntary compromise.

Defendants to pay plaintiff's costs.

Question of damages reserved for further consideration if necessary.

Judgment accordingly.

Solicitors for the plaintiff—*Drew & Napier and Rodyk & Davidson.*

Solicitors for the defendant—*Donaldson & Burkinshaw.*

[The defendant appealed to the Court of Appeal. The appeal was heard before Bucknill, C.J., Braddell and Edmonds, JJ. on the 7th, 8th and 9th February, 1916 and was dismissed without the respondent being called upon.]

[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
January 28, 1937.
[APPELLATE CIVIL JURISDICTION]
HOWES, Ag. C.J. (S.S.).
HORNE, J. & LAVILLE, Ag. J.
May , 1937.

PUAN YING (m.w.).....Appellant (Chargor)

vs.

S. M. S. SINNIAH CHETTIAR.....Respondent (Chargee).

[JOHORE BAHRU CHARGEE'S APPLICATION No. 24 of 1937].

[J. B. CIVIL APPEAL No. 1 of 1937].

LEE THON POO.....Appellant (Chargor)

vs.

S. R. M. S. CHETHAMBARAM CHETTIAR .....Respondent (Chargee).

[JOHORE BAHRU CHARGEE'S APPLICATION No. 25 of 1936].

[JOHORE BAHRU CIVIL APPEAL No. 2 of 1937].

Usurious Loans Enactment, Section 3 — charge—previous dealings—re-opening transaction—excessive interest.

P. Y. charged in favour of S. M. S. S. C. her undivided half share of the land comprised in Johore Government Grant No. 8209 for $3,600/- under charge "E" dated the 9th May 1929 and for $2,750/- under another Charge "N" dated the 12th April 1931. L. T. P., P.Y's husband and attorney, charged in favour of S. R. M. S. C. C. his land comprised in Grant No. 11871 to secure the repayment of $4,000/- by a Charge "R" dated the 9th August 1934. It was clear from the evidence that the charges in reality formed part of a series of transactions between P.Y. and her husband (hereinafter referred to as "the Chargors") on the one hand and S. M. S. S. C. and S. R. M. S. C. C. (hereinafter referred to as "the chargees") on the other hand. The Chargors having made default in payment, the chargees made two separate applications to have the lands, the subject-matter of the charges, sold in satisfaction of the debt. By order of Court dated the 24th January 1937 these applications were consolidated. The chargors contended that charge "R" was voidable under the Contract Enactment because it had been procured by undue influence and that the transaction was usurious within the meaning of the Usurious Loans Enactment.

Mills, J. before whom the applications were heard, held (1) that the contract was not induced by undue influence and therefore was not voidable under the Contract Enactment and (2) that the transaction sought to be re-opened was the contract on which the proceeding was brought, that is, Charge "R", and that that transaction was the only transaction with regard to which the Court was permitted to consider whether the interest charged was excessive and whether the transaction was substantially unfair. He held that the rate of interest 20 per cent was not unreasonable and refused relief under the Usurious Loans Enactment. The learned Judge accordingly made orders for sale of the lands by public auction.

Held, by the Court of Appeal, reversing the decision of Mills, J., that as Charge "R" was given as the result of an agreement to close previous dealings between the Chargors and the Chargees and to create a new obligation, the Court had power under Section 3 (1) of the Usurious Loans Enactment to re-open the transaction.

Held further that in the circumstances of the case the interest was excessive and the transaction substantially unfair.

CHARGEE'S APPLICATIONS consolidated by Order of Court dated the 24th January 1937.

Pillai (*H. N. McLeod* with him) for the Chargees.

Laycock and S. K. Das for the Chargors.

Cur. Ad. Vult.

MILLS, J.—On the 9th August 1934, the defendant promised to pay to the plaintiff a sum of $4,000.00 lent to the defendant, and also interest on the said sum at the rate of $24.00 by the $100.00 in the year, by equal payments of $80.00.

He charged his land to secure repayment.

The defendant having made default in payment, the plaintiff applies to the Court under Section 68(ii) of the Land Enactment to order the sale of the land unless the defendant shows adequate cause why the land should not be sold.

The present application has been consolidated with No. 25 of 1936 in which the defendant's wife is the borrower and chargor as it is clear that the defendant's wife acted on the direction and advice of her husband, the same considerations apply in both cases.

The defendant seeks to show cause as follows: he says:—

(a) the contract is voidable under section 19A of the Contract Enactment because it was procured by undue influence:

(b) the transaction was usurious within the meaning of the Usurious Loans Enactment, and he seeks release from his promise to re-pay.

At the start I warn myself that I must not be influenced by false sentiment to arrive at an incorrect conclusion of law or fact in a desire to assist the borrower; that I must guard against being unconsciously biassed by the use of the word "Chetty" or "moneylender"; and that the same law must be applied to every borrower and lender whether the lender be the Bank of England or an Asiatic shop-keeper, and whether the borrower be an Asiatic labourer or an English nobleman.

I consider first the question of undue influence. This is defined in Section 16(1) of the Contract Enactment. After examining the facts, I can find no evidence that the plaintiff was in a position to dominate the will of the defendant or that the plaintiff used that position to obtain an unfair advantage over the defendant.

I hold therefore that the contract between the plaintiff and defendant was not induced by undue influence, and, hence, is not voidable on that ground. I now consider whether the transaction was usurious.

The material words of Section 3(i) of the Usurious Loans Enactment are as follows:—

"Where.....the Court has reason to believe

(a) that the interest is excessive, and

(b) that the transaction was, as between the parties thereto substantially unfair.

The Court may.....

(i) re-open the transaction.....

First I must consider what is "the transaction."

From an examination of the Enactment as a whole and particularly of the explanation to Section 3(i), I hold that "the transaction" is the contract on which the proceeding is brought; that is, the contract of charge dated the 9th day of August 1934, and I hold that that transaction is the only transaction with regard to which the Court is permitted to consider whether the interest is excessive and whether the transaction is substantially unfair.

I must now enquire whether the interest is excessive. The interest is, by definition "the return to be made over and above what was actually lent."

In the present case, what was "actually lent."?

I hold that the word "lent" must be interpreted by reference to the definition of "Loan"; that definition is very wide, and includes any transactiion which is in the opinion of the court, in substance a loan.

In the present case, the borrower was under obligation to re-pay a loan of $4,000 to the lender; the lender discharged the borrower from that obligation; if the lender had discharged the borrower's obligation to pay a third party that discharge would, I hold, have amounted to a transaction which was in substance a loan; it cannot, in my view, make any difference whether the borrower's obligation was to pay the lender or a third party. I therefore, hold that "what was actually lent" was $4,000, as alleged by the borrower in the charge.

I hold that the interest is that specified in the charge; i.e. 24% per annum, to be paid by equal payments of $80 each month. Is this excessive? i.e. is it in excess of what the Court deems reasonable having regard to the risk?

Counsel for the plaintiff accepts the defendant's valuation of the property charged: on the face of it the security is adequate: and his counsel agrees that in such case there is no risk. I accept then, that the plaintiff incurred no risk, though I should have thought that in the case of rubber land subject to the Restriction scheme, it might be reasonable to put the matter at least as high as this "though the security has proved

sufficient I do not think at the time it could be considered as very certain and satisfactory" (cf. 111 Law Times Reports, at p. 429, *per* Pickford, L.J.). I have to decide what rate of interest is reasonable, there being adequate security and no risk.

Cheong Hock Chye's statement, in his affidavit, that the interest charged on land charges is, at most, not very much more than 9% may be correct for house property in Singapore, but is palpably absurd for rubber land in Johore. The usual rate charged at present when a loan is made on adequate security of rubber land is 18% p.a., but higher rates are not unusual, and 24% is charged to perhaps 10% of the cases coming before the Courts. Conditions in England and India may be so vastly different that the rates allowed by the Courts constitute no useful guide; from 5% to 81% has been allowed, according to circumstances, in the cases quoted before me during the argument; higher rates are not known in England. In the Federated Malay States conditions are more similar to conditions in Johore, though the value of money varies at different periods. In *Chait Singh's* case (1 F.M.S.L.R. p. 348; in 1918), 18% was allowed where the security was adequate.

In *Rengasamy Pillay's* case (4 F.M.S.L.R. p. 91; in 1923), the real rate of interest was very much more than 36% p.a.; the Court did not interfere with the contract to repay the debt, but the report does not state what risk was involved.

In certain recent cases in Johore, 24% p.a. has been allowed; no appeals were lodged against these decisions.

I would like to interpose that I can see nothing objectionable in compound interest as such; but the period of re-calculation must not be too frequent: in the Post Office Savings Bank, interest is added to capital at the end of every period of 12 months, and henceforth the depositor earns interest on the sum total of capital and interest earned in the previous year; I should be surprised to hear that any reasonable man regarded the depositor's action as unconscionable.

As to the rate of interest I may usefully quote the words of Lord James of Hereford "But we know the general rate of interest in commercial transactions, and in loans on perfect security. We know the rate of interest juries are in the habit of giving in cases of adjudging damages. But in respect of ordinary loans deviation from these guides, dependent upon the facts of each case, must doubtless be expected and ought to be allowed" [(1906) A.C. at p. 476].

I respectfully associate myself with the views of Channell, J. expressed in *Carrington's* case [(1906) 1 K.B. at p. 86].

"Interest is nothing but the sum to be paid for the use of money, for a certain time, and the value of a loan of money, as of everything else, is what it will fetch."

And again "But in the case before me there is nothing, unless the Act of Parliament forbids it, to prevent my saying that the defendant knew much better than I do what it was reasonable for him to pay for the accommodation he wanted." Sitting as a jury, I put these facts to myself

(a) 18% is the usual rate.
(b) 24% is sometimes paid.
(c) 24% has recently been allowed by the Johore Court without appeal.

Would a jury consider that 24% is reasonable or unreasonable?

Giving my best consideration to the matter, I do not hesitate to conclude that the jury would think 24% reasonable. I find therefore that the rate of interest specified in the charge is not excessive. I now consider whether the transaction was, as between the parties thereto, substantially unfair.

The defendant sets up two arguments:

1. He says that his liability on the 1934 charge was never explained to him, in my opinion, the Court cannot attach any weight to this, the defendant had some 18 transactions with the plaintiff during the 7 years 1927 to 1934: he paid certain monies on earlier loans, and if he had been called upon to pay more than he thought was due, he could have insisted that the 1934 charge was explained to him before he signed it, or he could have borrowed money from another lender: the defendant is now the owner of some 300 acres of planted rubber: I think I am justified in inferring that, whatever may have been his education or standard of literacy, he is a capable Chinese business-man.
2. He says that the rate of interest is sufficient evidence that the transaction was substantially unfair: he admits willingness to pay 18% he asks me to say that the increase of 6% to 24% is evidence of substantial unfairness, sitting as a jury I put to myself the same facts as before: and I ask whether a jury would consider that 24% is such a manifest inequality as to prove that the transaction is substantially unfair.

I do not hesitate to conclude that a jury would answer the question in the negative.

On the whole, I see no reason to believe that the interest is excessive or that the transaction was, as between the parties thereto, substantially unfair.

It follows that the Court has no power to grant relief under Section 3 of the Usurious Loans Enactment.

I am not impressed by the Defendant's tirade at the present magnitude of his debt: the Court must decide this case on logic and arithmetic, not on rhetoric.

In my judgment the defendant has failed to show sufficient cause why the land subject to the charge should not be sold by public auction.

I make orders in terms of paragraphs 1, 2, 3 and 4 of the plaintiff's originating summons in applications Nos. 24 and 25 of 1936.

Orders Accordingly.

The chargors appealed. The appeal was heard before Howes, Ag. C. J., Horne, J. and Laville, Ag. J. on the 1st of May, 1937.

Roland Braddell (*Goho* with him) for the appellants.

Williamson (*Pillai* with him) for the respondents.

The judgment of the Court was delivered by–

HOWES, AG. C.J.—My brethren desire me to say that they agree with the judgment I am about to read, which will, therefore, be the judgment of the whole Court.

This appeal arises out of two applications by the chargee under section 62 (ii) of the Land Enactment 1910, calling on the chargors to show cause why the lands, the subject matter of the charges, should not be sold in satisfaction of the debt.

By Order of the Court dated the 24th January 1937, the two applications Nos. 24 and 25 of 1936 were consolidated, and treated as one application. The chargors are man and wife.

The two applications are in respect of three charges, which throughout have been referred to as charges E, N. and R; and were respectively dated 4th May 1929 for the sum of $3,600; 12th April 1931 for $2,750; and 9th August 1934 for $4,000. In each charge the rate of interest was 24% per annum.

It was in evidence before the Court below, and in the argument it was admitted by both sides, that all three charges formed part of a series of loan transactions between the chargor and his wife on the one hand, and a Chettiar partnership or partnerships on the other hand, extending over a period from the 18th June 1927 to the 9th August 1934. In addition to these three charges which were given on land held under Government Grants, there are three other charges, given by the chargors on lands held by entry on the Mukim Register which are still outstanding, viz. charges O, P and Q. In respect of these last-named charges application has been made to the Collector of Land Revenue by the same chargees, for orders for sale. Orders for the sale of these lands have been made by the Collector, against whose decision an appeal has been lodged in the Court of the Judge, Johore.

Charges E. and N. were both given by the wife of the chargor on her half undivided share of the land comprised in Johore Government Grant No. 8209, containing an area of 84 acres, 1 rood, 10 poles. Charge E. was made on the 4th May 1929: charge N. on the 12th April 1931, on the same land, and was subject to the previous charge E. for $3,600. In other words, charge N. was a second charge over the same land, given by the same chargor.

Charge R, for $4,000, was given by the husband over an area of land containing 82 acres, 3 roods, 5 poles, comprised in Johore Government Grant No. 11871.

As the result of the chargee's application, it was, on the 28th January 1937, ordered that the lands subject to charges E, N. and R. be sold by public auction.

At the hearing of the consolidated applications, the chargor sought to prove that the contract was voidable under the Contract Enactment, because it had been procured by undue influence; and further, that the transaction was usurious within the meaning of the Usurious Loans Enactment, and substantially unfair; and on this ground asked that the transaction should be re-opened. A lengthy affidavit sworn on the 21st December 1936 by the chargor, was filed in support of these allegations; also affidavits by a Chartered Accountant and a Valuer.

The learned trial Judge found that the contract between the plaintiff and defendant was not induced by undue influence, and hence was not voidable on that ground. Upon the second issue, the trial Judge stated:— " On the whole, I see no reason to believe that the interest is excessive, or that the transaction was, as between the parties thereto, substantially unfair. It follows that the Court has no power to grant relief under section 3 of the Usurious Loans Enactment." He, accordingly, made orders for sale in each of the applications.

In arguing the appeal before us, Mr. Braddell, for the appellant, has confined his arguments to the Usurious Loans Enactment.

In para 6 of the Memorandum of Appeal, complaint is made that the trial Judge in his judgment only dealt with charge R, and the sum of $4,000 therein mentioned; and did not deal with charges E. or N. in any way. In para. 7 it is stated that the learned Judge was wrong in law in holding that the contract of charge dated 9th August 1934 (i.e. charge R) was the only transaction with regard to which the Court was permitted to enquire whether the interest was excessive and whether the transaction was substantially unfair.

The passage complained of appears on p. 2 of the judgment where the Judge was considering section 3(i) of the Usurious Loans Enactment which gives the Court power to re-open the transaction. It reads as follows:—

> " First I must consider what is 'the transaction.' From an examination of the Enactment as a whole and particularly of the explanation to section 3(i), I hold that 'the transaction' is the contract on which the proceeding is brought; that is, the contract

of charge dated the 9th day of August, 1934; and I hold that that transaction is the only transaction with regard to which the Court is permitted to consider whether the interest is excessive, and whether the transaction is substantially unfair."

The Johore Usurious Loans Enactment (No. 42) is practically identical with the Indian Usurious Loans Act 1918 which, in turn, was based on the Imperial Money-Lenders Act 1900.

Section 3 of the Enactment forms a complete code, as far as the State of Johore is concerned; and it is unnecessary to refer to the Imperial Act, or the decisions thereunder.

Section 3 of the Enactment reads:—

(1) Where, in any proceeding to which this Enactment applies, whether heard *Exparte* or otherwise, the Court has reason to believe—
  (a) that the interest is excessive, and
  (b) that the transaction was, as between the parties thereto, substantially unfair,

the Court may exercise all or any of the following powers, namely, may—

(1) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of excessive interest,

(2) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, re-open any account already taken between them, and relieve the debtor of all liability in respect of any excessive interest and if anything has been paid or allowed to account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof."

The next para. (3), and the provisos which follow, and the "explanation" have no bearing on the present case. Proviso (a) prevents the Court re-opening any agreement purporting to close previous dealings and to create a new obligation, entered into more than six years from the date of the transaction, which, according to the "Explanation" means the first of such transactions.

From the reference to "the explanation to section 3(1)" in his judgment, it appears that the learned trial Judge misread the "explanation," and was mistaken in holding it to be explanatory of the expression "the transaction" in section 3 (1) (a). Clearly, the explanation only explains the meaning of the words "the transaction" contained in proviso (a), and limits that expression to the first of a series of transactions.

He also appears to have considered that the Court could only exercise the power of re-opening the transaction, under (1) of section 3(i); whereas the chargor's case is that charge R was given by him as the result of an agreement to close previous dealings and to create a new obligation, and that the chargor received no money as consideration for giving charge R.

This being so, the Court could have exercised its powers under (2), provided it had reason to believe that the interest was excessive and the transaction was substantially unfair, and have re-opened the account already taken between the chargor and chargee, (which led to the giving of charge R) and have relieved the chargor of liability in respect of excessive interest.

In our view, the trial Judge was wrong in coming to the conclusion that the charge of the 9th August, 1934 (charge R) was the only transaction which he was permitted to consider in deciding whether the interest was excessive and the transaction substantially unfair. Had he taken into account the previous dealings between the parties, his final conclusion might, in view of the evidence before him, have been altogether different. As it was, in refusing to go outside the four corners of the documents of charge and in refraining from an examination of the transactions which those documents purported to record, he approached the case from a wrong standpoint and thereby defeated the object of the Usurious Loans Enactment.

It is therefore necessary for this Court to go through the previous dealings between the parties, in order to ascertain whether the interest was excessive (within the meaning of the Enactment) and whether the transaction was substantially unfair.

With regard to the finding by the learned Judge that in charge R interest at the rate of 24% per annum was not excessive; he appears to have ignored the evidence of the Chartered Accountant, Mr. Evan Wong, whose affidavit showed that the apparent 24%, in fact, amounts to 52.8% simple interest, on the actual cash lent.

The learned Judge also preferred to rely on reported cases in the F.M.S. in which 24% had not been dissallowed by the Courts, than on the evidence in the affidavit of Cheong Hock Chye that about 9% simple interest would be a usual rate, in such cases.

Before us, counsel agreed that in Johore 18% has, in the past, been a common rate of interest on charges, but now, by Enactment No. 4 of 1937, (which came into force on the 16th March, 1937) section 3 of the Usurious Loans Enactment has been amended and it is provided that, until the contrary is proved, if the interest exceeds 12% per annum in the case of secured, and 18% per annum in the case of unsecured loans, the Court shall presume that the interest charged is excessive and the transaction substantially unfair.

There was no evidence that the chargees expected to run any unusual risk in advancing the money on the security of the land charged. On the contrary, it was, all along, admitted that the security was ample.

Section 3 (ii) (2) of the Enactment states:

"In this section 'excessive' means in ex-

cess of that which the Court deems to be reasonable, having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan."

It was open to the chargee to have filed a counter-affidavit to show that 24% was the prevailing rate of interest in the locality; or that, in the circumstances in which the loan was advanced, the high rate of interest was justified in view of the risk to which the chargee was exposed, which might have made the transaction a substantially fair one. He failed to adduce any such evidence, when the applications were heard.

To deal now with paragraph 7 of the Memorandum of Appeal: we are of opinion that the learned Judge should have taken into consideration charges E and N in addition to R; as, by consent, these charges were the subject-matter of the consolidated applications.

On examination, it seems clear that through N, the three charges are linked together; because N is one of a series of charges L, and M given on the same date, viz. 12th April 1931 and presumably, as the result of an agreement to close previous transactions. Charge L is related to R, since it was given on the same land, viz. on Grant No. 11871; and N, as already stated, is related to E, being a second charge on the same land.

The first of the three charges under consideration, in order of date, is E, which was given in respect of a cash loan of $3,000 made on the 4th May 1929. The sum secured by the charge was, however, $3,600; $600 having been added to the $3,000 as capitalised interest, i.e. 24% on $3,000 for 10 months. There is evidence that at that date the value of the half undivided share of the land was $18,000. The $3,000 was to be repaid by 9 payments of $60 per month, and a final payment of $3,060 on the 4th of March 1930, the 10th month. If the amount was not repaid at that date, then the $3,600 is to carry interest at the rate of 24% per annum until payment. The inclusion of ten months interest as part of the loan gives a greater return than 24% per annum simple interest. Even on the face of it, this transaction was entered into at an excessive rate of interest because there was an absence of risk. Accordingly, as excessive interest may, under the Enactment, of itself be sufficient evidence that the transaction is substantially unfair, grounds have been established so as to enable the Court to re-open that transaction. Moreover, from Mr. Wong, the Chartered Accountant's calculations, the average rate on all the transactions is shown to be much higher, viz. 52.8 per cent, simple interest.

Charge E cannot, however, be considered apart from charge N; since they are both on the same land, and the application to the Court was for the sale of that land. "N" was given just under two years later, viz. on 12th April 1931. By that time, the security had fallen in value. The valuer's affidavit puts the value at $10,000. The debt on the land, resulting from the excessive terms of the first charge (E), was then about $5,400. A further $2,750 is expressed to be lent by charge N on the 12th April 1931, and interest is to be at the rate of 24% per annum payable by equal payments of $55 per month for eleven months. Provision is made for abatement of interest in the event of repayment of capital; and for the balance unpaid to carry interest proportionately. There is a default clause, providing that in the event of any monthly instalment of interest not being paid, then the whole amount of principal and interest then outstanding is to fall due and carry interest at 24%. No monthly payment of interest was made by the chargor. The position was, therefore, that on the 12th May 1931 by the addition of $55 interest, the $2,750 had become $2,805 and was carrying interest at 24% per annum, and that sum increased at the rate of $55 each month for the next eleven months.

If charge E had been at a reasonable rate of interest, there would have been much less than $5,400 due at the time charge N was created; and the security, in respect of the further $2,750, would have been ample; as, at that date, the land is valued at $10,000.

Charge N must, however, be regarded from another angle. It is one of three charges L, M and N given on the 12th April 1931. The evidence is that on that date only $647.50 actual cash was received. These three charges amounted to $9,000, and the balance $8,352.50 was appropriated to payment of interest on, or to settlement of other debts resulting from prior loans; $720/- of this sum having been appropriated as interest towards charge E.

Whether Mr. Wong's calculation that the rate of interest works out at 52.8 per cent. is correct or not, it is clear that the result of the dealings between the parties is that the chargee is claiming a higher rate than even 24%. It is also clear that by the substitution of charges for previous charges and promissory notes and the interest due thereon, interest upon interest at a high rate is being charged.

With regard to charge R, the date is comparatively recent—9th August 1934. On that date, there was a cancellation of three previous charges G, L and M between the same parties. The sums secured by charges G, L and M amounted to $13,450; and yet, on the 9th August 1934, we find new charges, viz. O, P, Q, and R created, amounting to $32,000, all of which carry interest at 24%. It is not disputed that at that date the value of the land charged was greatly in excess of the amount of these four charges.

Taking R separately; $4,000 is charged on land valued at $7,000. The principal sum is less than two-thirds of the value. Interest at the rate of 24% per annum is to be paid by eleven instalments of $80 per month, and the principal to be paid on the 9th August 1935. There is the

default clause by which the principal and the unpaid interest from the date of the failure to pay the monthly instalments shall immediately become due and payable on demand. The remuneration to the lender is therefore higher than 24%, and is excessive in view of the fact that there is ample security in the form of land valued at $7,000. But no money ever passed on this transaction, even though the document expresses it to be a loan of $4,000. Charge R is on the same land as charge L, which was a charge for $2,250 at 24%. The date of L was 12th April 1931, when the three charges L, M and N were created for $9,000 of which only $647.50 was received in cash. Charge R therefore appears to have been given in substitution for charge L, which in turn was created as a result of the transaction of the 12th April 1931. Even if charge R had actually been a simple loan of $4,000 cash on the security of land valued at $7,000, the remuneration to the lender might have been considered so excessive as to make the transaction substantially unfair; but when the evidence of the surrounding and antecedent circumstances in which this charge was created is considered, then in the absence of any evidence to the contrary, the unfairness is beyond all dispute.

This being so, the transaction can be reopened.

Having decided that this Court should reopen the three transactions E, N and R, this brings into operation section 3 (i) (2) because there is an agreement made on 9th August 1934 and another on the 12th April 1931, both of which purported to close previous dealings.

We appreciate the point taken by Mr. Williamson, counsel for the Chargee, who referred to in *Nageswara Ayyar* v. *M.L.M. Ramanathan Chettiar and another* (A.I.R. 1935 Mad. 468), that a debtor ought not to invoke the aid of the Court in his favour, merely because by his own default in repaying the loan, the amount has swelled considerably; but from the history of the transactions, it is easy to understand how one debt led to another. Instead of enforcing his rights against the chargor, the chargee was willing to continue to advance large sums, nominally in cash, but most of which in fact were appropriated to paying off interest or principal sums due on previous charges or promissory notes; thus piling up the chargor's liability.

According to the chargor's affidavit, the result of the series of transactions between him and the chargee shows that the chargor is liable to pay $63,490/–, for which he and his wife have only received in cash $19,240.00.

The chargor further states in paragraph 8 of his affidavit, that the default clauses in the various charges and promissory notes were never explained to him; and in paragraph 11 that he did not appreciate his and his wife's liability because the transactions were not explained to them, and neither of them knew English.

As was pointed out in the above case (A.I.R. 1935 Mad. at page 471) the provisions of section 3 (ii) (a) of the Usurious Loans Enactment "impose on the Court the duty of coming to a conclusion as to what will be a reasonable rate of interest, having regard to the risk incurred," once the Court is satisfied, (as we are) that this is a case in which we should order the accounts between the parties to be re-opened.

The fact that some of the charges referred to in these proceedings contain no covenant for the payment of interest after the date for repayment of the principal, will not affect the order we propose to make, because in re-opening the transactions we shall fix a rate of interest which we consider reasonable in the circumstances, throughout.

In conclusion, therefore, we allow this appeal and set aside the order of the learned trial Judge, and declare that all the transactions and accounts whatsoever, arising on and from 18th June 1927, between the chargors (appellants) and the chargees (respondents) ought to be re-opened and set aside, and that the chargors (appellants) ought to be relieved from payment of any sum in excess of the sums actually advanced by the chargees to the said chargors and interest thereon at the rate of 15% per annum simple interest; and that if any such excess has been paid by the chargors, the chargees ought to repay the same to the chargors; and the Court doth order and adjudge the same accordingly. And it is ordered that the following account be taken, that is to say, an account of all sums actually advanced by the chargees to or for the use of the chargors on and from the 18th June 1927, and of all sums received by the chargees from the chargors in respect of any such advance, and that on taking such account the chargors be charged with interest at the rate of fifteen per centum per annum (simple interest) on the sums from time to time owing to the chargees; and that the balance due from either party to the other be certified. And if any sum is found due to be paid by the chargors to the chargees such sum shall stand charged upon the lands of the chargors now charged to the chargees, in the same proportion as the amounts now charged on the said lands are distributed thereon, and such sums shall carry interest at the rate of twelve per centum per annum until payment. And if the amount so certified and the interest due thereon is not paid on or before the 31st July 1937 the said lands shall be sold by public auction, under the direction of the Court, with liberty to apply for such further direction as may be necessary.

And it is ordered that the costs of this appeal be taxed and paid by the respondent to the appellant, and that the costs incurred in the Court below be paid by the respondent to the appellant; and that the costs of the taking of the account be borne in equal shares by each party and that the appellants be entitled to set off the costs due to them against any amount that may be found due by them on the certificate.

Appeal Allowed.

Solicitors for appellants—*S. C. Goho & Co.*

Solicitors for respondents—*Pillai & Co.*